SUBMITTED

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1926

No. [redacted] 90

THE GOODYEAR TIRE & RUBBER COMPANY, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

FILED APRIL 30, 1926

(31,007)

(31,097)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925

No. 397

THE GOODYEAR TIRE & RUBBER COMPANY, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

INDEX

	Original	Print
Record from Court of Claims	1	1
Petition	1	1
General traverse	7	3
Argument and submission	7	4
Findings of fact	8	4
Conclusion of law	10	6
Opinion, Downey, J.	10	6
Judgment	13	8
Petition for appeal	13	8
Order allowing appeal	13	9
Clerk's certificate	14	9

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 23, 1925

[fol. 1] **IN COURT OF CLAIMS OF THE UNITED STATES**

No. D-794

THE GOODYEAR TIRE & RUBBER COMPANY

vs.

THE UNITED STATES

Stock Transfer Tax

I. PETITION—Filed October 9, 1924

The claimant respectfully represents:

1. The claimant, The Goodyear Tire & Rubber Company, is a corporation duly organized pursuant to the laws of the State of Ohio.

2. Prior to April 11, 1921, the claimant corporation had an authorized common capital stock of $100,000,000, represented by [fol. 2] 1,000,000 shares of par value $100 each, of which 610,475 shares were outstanding. By certificate of reduction of the common capital stock of the claimant corporation filed April 11, 1921, pursuant to the laws of the State of Ohio, with the Secretary of State of Ohio, the common capital stock of the claimant corporation was reduced from $100,000,000 to $1,000,000 by the reduction of the part value of each share of stock from $100 to $1. The issue of new certificates for the stock which was outstanding was not required by the laws of the State of Ohio, and no new certificates were issued for the stock which was outstanding.

3. Thereafter, The Goodyear Tire & Rubber Company was reorganized pursuant to the laws of the State of Ohio by certificate of reorganization filed May 21, 1921, and recorded in Volume 265, page 583 of the Records of Incorporation of the State of Ohio. Prior to said reorganization the authorized common capital stock of the company was 1,000,000 shares of the par value of $1 per share, of which 610,475 shares were outstanding. The said certificate of reorganization provided that the authorized common stock should be 1,500,000 shares without nominal or par value and that in place of the outstanding shares of common stock there should be issued to the holders thereof, for each one share thereof, one share of the non-par common stock of the reorganized corporation. During the period from May 23, 1921, until June 16, 1922, 534,849 shares of the non-par common stock of the reorganized corporation were issued in place of the outstanding shares of common par stock as provided in said certificate of reorganization, in the following manner: Holders of the outstanding par common stock assenting to a certain plan and agreement of reorganization dated February 1, 1921, under which [fol. 3] the reorganization was effected, assigned their stock to certain

voting trustees (created by a certain voting trust agreement made pursuant to said plan and agreement of reorganization), and deposited the certificates for such par common stock duly endorsed for transfer with The Union Trust Company of Cleveland, Ohio, as agent for said voting trustees. Said Union Trust Company, which also acted as transfer agent of The Goodyear Tire & Rubber Company, in pursuance of authority conferred upon it by said The Goodyear Tire & Rubber Company, then exchanged such par common stock certificates for certificates for an equal number of shares of non-par stock, which were issued in the name of The Union Trust Company as agent for said voting trustees. The Union Trust Company, duly authorized thereunto by said voting trustees, then issued and delivered to each of said assenting stockholders a voting trust certificate or certificates representing a number of shares of non-par common stock equal to the number of shares of par common stock represented by the certificates previously deposited as aforesaid by said stockholder. All of said acts were done in pursuance of the plan and agreement of reorganization dated February 1, 1921.

4. The Revenue Act of 1918, which was in effect during the year 1921, and the Revenue Act of 1921, which was in effect during the calendar year 1922, contained certain identical provisions as follows:

"Sec. 1100. That on and after April 1, 1919,* there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described [fol. 4] in Schedule A of this title, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, are written or printed, by any person who makes, signs, issues, sells, removes, consigns, or ships the same, or for whose use or benefit the same are made, signed, issued, sold, removed, consigned, or shipped, the several taxes specified in such schedule. The taxes imposed by this section shall, in the case of any article upon which a corresponding stamp tax is now imposed by law, be in lieu of such tax.

"Schedule A. 4. ** Capital stock, sales or transfers: On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to shares or certificates of stock or of profits or of interest in property or accumulations in any corporation, or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock, interest, or rights or not, on each $100 of face value or fraction thereof, 2 cents, and where such shares are without par or face

---

* "January 1, 1922," in the Revenue Act of 1921.
** "3" in the Revenue Act of 1921.

value, the tax shall be 2 cents on the transfer or sale or agreement to sell on each share (unless the actual value thereof is in excess of $100 per share, in which case the tax shall be 2 cents on each $100 of actual value or fraction thereof:)***."

5. Upon these facts the Commissioner of Internal Revenue held that taxes were due as follows as stated in a letter to the claimant dated June 16, 1922:

"Transfer of 534,849 shares old Com. $100 par value stock to voting trustees at 2 cents per share. Tax due $10,696.98."

[fol. 5] 6. The claimant contends that if any tax was due it should not have been in excess of a tax based on a par value of $1 per share for said stock, which would be a tax of $465.06, so that $10,231.92 of the proposed tax was illegal and erroneous.

7. On or about May 26, 1923, the taxpayer paid the total additional tax of $10,696.98 to the Collector of Internal Revenue at Cleveland, Ohio, under protest and with duress, and to avoid the imposition of penalties. On or about June 12, 1923, the claimant filed a claim for refund, and said claim was rejected by the Commissioner of Internal Revenue on or about September 5, 1923.

8. No part of said sum of $10,696.98, of which $10,231.92 was erroneously collected by the United States, has been repaid to the claimant. The claimant has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against said Government. It is the sole and absolute owner of the claim herein presented. It has made no transfer or assignment of said claim or any part thereof, and is justly entitled to the amount claimed herein from the United States after allowing all just credits and set-offs.

The claimant therefore prays judgment in its favor against the United States in the sum of $10,231.92, with interest thereon at 6% per annum from May 26, 1923.

The Goodyear Tire & Rubber Company, by Chas. A. Stillman, Secretary. Covington, Burling & Rublee, Attorneys for Claimant.

[fol. 6] *Duly sworn to by Chas. A. Stillman. Jurat omitted in printing.*

[fol. 7] II. General Traverse—December 9, 1924

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendant, a general traverse is entered as provided by Rule 34.

*** Words in brackets not in Revenue Act of 1921.

III. Argument and Submission

On March 19, 1925, this case was argued and submitted on merits by Mr. Spencer Gordon, for the plaintiff, and by Mr. Roscoe R. Koch, for the defendant.

[fol. 8] IV. **Findings of Fact, Conclusion of Law, and Opinion of the Court by Downey, J.**—Entered April 6, 1925

This case having been submitted to the court upon a stipulation of facts, signed by Covington, Burling & Rublee, as attorneys for plaintiff, and Robert H. Lovett, Assistant Attorney General, the court, in accordance with said stipulation, makes the following

Findings of Fact

I

The claimant, the Goodyear Tire & Rubber Co., is a corporation duly organized pursuant to the laws of the State of Ohio.

II

Prior to April 11, 1921, the claimant corporation had an authorized common capital stock of $100,000,000, represented by 1,000,000 shares of par value $100 each, of which 610,475 shares were outstanding. By certificate of reduction of the common capital stock of the claimant corporation filed April 11, 1921, pursuant to the laws of the State of Ohio, with the secretary of state of the State of Ohio, the common capital stock of the claimant corporation was reduced from $100,000,000 to $1,000,000 by the reduction of the par value of each share of stock from $100 to $1. No new certificates were issued for the stock which was outstanding.

III

Thereafter the Goodyear Tire & Rubber Co. was reorganized pursuant to the laws of the State of Ohio by certificate of reorganization filed May 21, 1921, and recorded in volume 265, page 583 of the Records of Incorporation of the State of Ohio. Prior to said reorganization the authorized common capital stock of the company was 1,000,000 shares of the par value of $1 per share by virtue of the action set out in Finding II, of which 610,475 shares were outstanding, evidenced by the old certificates of $100 per share face value. The said certificate of reorganization provided that the authorized common stock should be 1,500,000 shares without nominal or par value and that in place of the outstanding shares of common stock there should be issued to the holders thereof, for each one share thereof, one share of the nonpar common stock of the [fol. 9] reorganized corporation. During the period from May 23,

1921, until June 16, 1922, 534,849 shares of the nonpar common stock of the reorganized corporation were issued in place of the outstanding shares of common par stock as provided in said certificate of reorganization, in the following manner: Holders of the outstanding par common stock assenting to a certain plan and agreement of reorganization dated February 1, 1921, under which the reorganization was effected, assigned their stock to certain voting trustees (created by a certain voting trust agreement made pursuant to said plan and agreement of reorganization), and deposited the certificates for such par common stock duly indorsed for transfer with the Union Trust Co., of Cleveland, Ohio, as agent for said voting trustees. Said Union Trust Co., which also acted as transfer agent of the Goodyear Tire & Rubber Co., in pursuant of authority conferred upon it by said the Goodyear Tire & Rubber Co., then exchanged such par common stock certificates for certificates for an equal number of shares of nonpar stock which were issued in the name of the Union Trust Co. as agent for said voting trustees. The Union Trust Co., duly authorized thereunto by said voting trustees, then issued and delivered to each of said assenting stockholders a voting trust certificate or certificates representing a number of shares of nonpar common stock equal to the number of shares of par common stock represented by the certificates previously deposited as aforesaid by said stockholder. All of said acts done in pursuance of the plan and agreement of reorganization dated February 1, 1921.

IV

Upon these facts the Commissioner of Internal Revenue held that taxes were due as follows as stated in a letter to the claimant dated June 16, 1922:

"Transfer of 534,849 shares old Com. $100 par value stock to voting trustees at 2 cents per share. Tax due $10,696.98."

V

The transfer tax on said stock based on a par value of $1 per share would have amounted to $465.06.

VI

On or about May 26, 1923, the taxpayer paid the total additional tax of $10,686.98 to the collector of internal revenue at Cleveland, Ohio, under protest and with duress, and to avoid the imposition of penalties. On or about June 12, 1923, the claimant filed a claim for refund, and said claim was rejected by the Commissioner of Internal Revenue on or about September 5, 1923.

VII

No part of said sum of $10,696.98 has been repaid to the claimant. The claimant has at all times borne true allegiance to the Govern-

ment of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against said Govern-[fol. 10] ment. It is the sole and absolute owner of the claim herein presented. It has made no transfer or assignment of said claim or any part thereof.

Conclusion of Law

Upon the facts found the court concludes as matter of law that the plaintiff is not entitled to recover and that its petition ought to be dismissed.

It is therefore adjudged that plaintiff's petition be dismissed with judgment in favor of the United States for cost of printing the record herein, to be taxed and collected by the clerk.

Opinion

Downey, Judge, delivered the opinion of the court:

The facts are stipulated and the findings, at the request of both parties, substantially follow the stipulation.

The question is whether a tax, conceded to have been properly imposed on the transfer to voting trustees of 534,849 shares of the common stock of the plaintiff corporation, should properly have been imposed on the basis of $100 par value per share, which was done, or on a par value of $1 per share. The tax as imposed and paid amounted to $10,696.98. It is stipulated that if properly to be imposed on the basis of $1 par value per share the tax would have amounted to $465.06, although the basis for such a conclusion is not apparent and is not shown.

A theory of fact upon which the case is argued on both sides and apparently accepted as correct is not covered by the stipulation, limited to what it says. It is not aided by any evidence.

The contention that the tax should have been on a basis of $1 par value per share instead of $100 as written in the stock certificates is predicated on action had on April 11, 1921, said to have been pursuant to the laws of the State of Ohio, whereby "the common capital stock of the plaintiff corporation was reduced from $100,000,000 to $1,000,000 by the reduction of the par value of each share of stock from $100 to $1. No new certificates were issued for the stock which was outstanding."

A reorganization agreement was entered into as of February 1, 1921, pursuant to which a reorganization was had on May 21, 1921, the reorganization providing for the issuance of 1,500,000 shares of nonpar common stock in lieu of the outstanding common stock, the nonpar stock to be issued share for share to the holders of the old stock. It is said that the holders of the old common stock "assigned their stock to certain voting trustees and deposited the certificates for such common stock duly indorsed for transfer with the Union Trust Co. of Cleveland, Ohio, as agent for said voting trustees," this being the transaction which gave rise to the assessment of the tax in question.

The stipulation recites that "during the period from May 23, 1921, until June 16, 1922, 534,849 shares of the nonpar stock of the reorganized corporation were issued in place of the outstanding shares of common par stock as provided in said certificate of reorganization in the following manner," reciting the procedure under [fol. 11] the reorganization agreement of February 1, 1921, of which the assignment and deposit of the old certificates was a part.

The issuance of the new nonpar stock said to have begun May 23, 1921, was necessarily subsequent to the reorganization of May 21, which authorized the issuance, but the assignments of the old $100 par stock to the voting trustees, provided for in the reorganization agreement of February 21, are not shown to have been either in whole or in part subsequent to April 11, 1921, when the action was had reducing the par value.

However, these assignments are treated by both parties in arguments as if made subsequent to April 11, 1921, and we therefore do not hang the case solely on the failure to cover the possible fact in the stipulation, but consider it also on the theory on which presented.

Having outstanding certificates evidencing the ownership of shares of the capital stock of the plaintiff corporation which upon their face fixed their face or par value at $100 each, could action such as that had on April 11, 1921, reducing the par value of shares of stock but leaving the $100 par value certificates outstanding, serve to change the face or par value thereof for the purpose of a tax imposed upon their assignment and delivery? We think not.

It is of course true that one may subscribe to the capital stock of a corporation and become the owner of shares thereof even though no certificates be issued, and that transfers of ownership under proper provisions in the articles of incorporation or by-laws may be evidenced solely by the books of the corporation. The ownership is sometimes said to be of shares of the capital stock of which the certificates are merely the evidence.

But in this case there were outstanding certificates, reciting the face or par value thereof and no steps were taken toward calling them or substituting therefor certificates of the lesser face value. They were left outstanding to be dealt in and dealt with as is usual with such certificates. Under the circumstances the case would seem to turn upon determination of the question as to what was taxed.

The Commissioner of Internal Revenue levied the tax upon the "Transfer of 534,849 shares of old Com. $100 par value stock to voting trustees at 2 cents per share."

The certificates evidencing the ownership of this stock were assigned to voting trustees and after being "duly indorsed for transfer" were delivered to the agent of said trustees. The assignment of the certificates was the adopted method, regarded no doubt as necessary, for it is the prescribed method where certificates of stock are issued.

The revenue act of 1918, section 1100, Schedule A, paragraph 4 (40 Stat. 1135), which provisions are also found in the act of 1921, covers a wide field, but the language apparently applicable here is

that which taxes "transfers of legal title to shares or certificates of stock" and fixed the tax at 2 cents "on each $100 of face value or fraction thereof."

The law, the transaction as had, and the assessment seem to dovetail rather conclusively and to preclude the idea that action had could serve to change the effect of the law construed and applied as such transactions ordinarily require.

[fol. 12] How, in the face of the language of the statute, the amount stipulated as the correct tax if the $1 par value was to apply, is arrived at, we do not comprehend, but accept the stipulation and note that peculiarly, though transfer of the shares of nonpar stock issued under the reorganization would be taxed at 2 cents as were the $100 par value shares, the simple expedient of fixing, during an interim, a par value of $1, reduced the tax more than $10,000.

There is no suggestion of bad faith or improper motives on the part of the plaintiff, and we impute none, but since the possibilities of a construction are sometimes for consideration, it seems apparent that, under plaintiff's theory, the action taken on April 11 served to materially reduce the tax on transfers which had been provided for by the agreement of February 1, when the certificates to be exchanged, on reorganization, for nonpar certificates were yet unquestionably of the face and par value of $100. Very possibly there may be a satisfactory explanation, not brought into the record, as to why, pending the reorganization agreement, the action of April 11 was had; but the possibilities must weigh in construing such a transaction.

We are of the opinion that the tax was properly assessed and therefore the plaintiff may not recover.

Graham, Judge; Hay, Judge; Booth, Judge; and Campbell, Chief Justice, concur.

[fol. 13] V. Judgment—April 6, 1925

At a Court of Claims held in the City of Washington on the 6th day of April, A. D., 1925, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises, find in favor of the defendant, and do order and adjudge that the plaintiff, as aforesaid, is not entitled to recover any sum in this action of and from the United States; and that the petition herein be and the same hereby is dismissed.

VI. Petition for Appeal—Filed April 13, 1925

Now comes the claimant, by Covington, Burling & Rublee, its attorneys of record, and respectfully prays for the allowance of an appeal in the above-entitled cause to the Supreme Court of the United States from the judgment entered April 6, 1925.

Covington, Burling & Rublee, Attorneys for Claimant.

VII. Order Allowing Appeal

It is ordered by the Court this 20th day of April, 1925, that the plaintiff's application for appeal be and the same is allowed.

[fol. 14] In Court of Claims of the United States

[Title omitted]

Clerk's Certificate

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the finding of fact, conclusion of law and opinion of the court by Downey, J.; of the judgment of the court; of the plaintiff's application for, and the order of the court allowing, appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this 27th day of April, A. D., 1925.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal of the Court of Claims.)

Endorsed on cover: File No. 31,097. Court of Claims. Term No. 397. The Goodyear Tire & Rubber Company, appellant, vs. The United States. Filed April 30th, 1925. File No. 31,097.

(8347)

FILED
NOV 17 1928
WM. R. STANSBURY
CLERK

In the
Supreme Court of the United States

OCTOBER TERM, No. 90.

THE GOODYEAR TIRE & RUBBER COMPANY, *Appellant*,
vs.
THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT, THE GOODYEAR TIRE & RUBBER COMPANY.

GEORGE RUBLEE,
SPENCER GORDON,
Attorneys for Appellant.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

Index.

	Page
Report of opinion below	1
Jurisdiction	1
Statement of the case	2
Assignments of error	4
Argument	5
The statute involved	5
"Face value" in the statute means "par value"	6
The par value of corporate stock is to be found by reference to the certificate of incorporation no matter what may appear on the outstanding stock certificates	8
The tax is on the sale or transfer of capital stock, not on the delivery of the certificates, and therefore is based on the actual par value of the capital stock and not on such amount as may be stated in the certificates delivered	10
There is no indication that the reduction in par value was to avoid taxes, but if it was such a device that is immaterial	12
Conclusion	14

Table of Cases Cited.

Baldwin Locomotive Works v. McCoach, 215 Fed. 967; 221 Fed. 59	9
Boston & Maine R. R. v. United States, 265 Fed. 578	7
Forty-Fort Coal Co. v. Kirkendall, 233 Fed. 704	9
Goodyear Tire & Rubber Co. v. United States, 60 C. Cls. 486	1
Industrial Trust Co. v. Walsh, 222 Fed. 437	9
Reading Steel Casting Co. v. United States, 268 U. S. 186	2
Security Trust Co. v. Ford, 75 Oh. St. 322	7
Southern Pacific Co. v. Lowe, 247 U. S. 330	9
United States v. Isham, 17 Wall. 496	13

Table of Statutes and Regulations Cited.

	Page
Section 242 of Judicial Code (36 Stat. 1157)	2
Section 1100, Revenue Act of 1918 (40 Stat. 1133)	5
Schedule A 3, Revenue Act of 1918 (40 Stat. 1135)	5
Section 1100, Revenue Act of 1921 (41 Stat. 301)	5
Schedule A 4, Revenue Act of 1921 (41 Stat. 304)	5
Regulations 40 (1922 Edition) 24 Treasury Decisions, Internal Revenue 968	6, 10, 11

In the
Supreme Court of the United States

October Term, No. 90.

The Goodyear Tire & Rubber Company, *Appellant*,
vs.
The United States.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT, THE GOODYEAR TIRE & RUBBER COMPANY.

Addendum

Since this brief was filed, the Solicitor General has filed a brief in which he states (Page 14) that he is not able to support the decision of the Court of Claims. The case is therefore submitted without argument.

Jurisdiction.

The amount claimed by the plaintiff was $10,696.98. The judgment of the Court of Claims was entered

April 6, 1925. (R. 8). Prior to May 13, 1925, Section 242 of the Judicial Code, 36 Stat. L. 1157, permitted appeals by the plaintiff to this Court from final judgments of the Court of Claims, where the amount in controversy exceeded $3,000, and this appeal was had thereunder.

Statement of the Case.

This is a suit to recover stamp taxes paid on the transfer of certain corporate stock. The material facts, as found pursuant to stipulation, are as follows:

Prior to April 11, 1921, the claimant corporation had an authorized capital stock of $100,000,000, represented by 1,000,000 shares of par value of $100 each, of which 610,475 shares were outstanding. By certificate of reduction of common capital stock, filed April 11, 1921, with the Secretary of State of Ohio pursuant to the laws of that state, the common capital stock of the claimant company was reduced from $100,000,000 to $1,000,000 by the reduction of the par value of each share of stock from $100 to $1. No new certificates were issued for the stock which was outstanding. (R. 4)

Thereafter,* in 1921 and 1922, 534,849 shares of the

*NOTE.—The Court of Claims formally found the facts as stipulated but suggested in its opinion that it was not clear that the transfers were after April 11, 1921. (R. 7) It is respectfully submitted that Finding 3 shows with reasonable clarity that the transfers were "during the period from May 21, 1921 until June 16, 1922", since the use of the colon after the clause containing those dates fairly indicates that those dates apply to the following sentences without repeating them in each sentence. (R. 1) Moreover, "these assignments are treated by both parties in arguments as if made subsequent to April 11, 1921" (R. 7), and the facts admitted and the concessions made by the parties may be considered with the findings of fact. Reading Steel Casting Company v. United States, 268 U. S. 186.

outstanding common stock of the company were transferred.

It is admitted that there was a par value transfer tax due upon such transfer, but it is the contention of the company that such transfer tax should have been based on the actual par value of the stock at that time, as stated in the certificate of incorporation, which was $1 per share. The Bureau of Internal Revenue, however, collected a tax on the basis of $100 par value per share, contending that the apparent par value shown in the stock certificates governed rather than the actual par value shown by the amended articles of incorporation as evidenced by the certificate of reduction which had been filed with the Secretary of State. (*R. 5*)

There is no dispute as to the number of shares transferred or the amount of the tax thereon according to the two theories. It is agreed that if the tax should have been assessed on a basis of $100 par the claimant is not entitled to recover. But if it should have been assessed as upon $1 par, the tax should have been $465.06** instead of the $10,696.98 which was collected, so that there has been an overpayment of $10,231.92. This tax was collected May 26, 1923.

**NOTE.—The Court of Claims expressed some doubt as to the amount of this tax, but accepted the stipulation. (R. 8) The Court evidently assumed that a tax on the same amount of stock on a $1 par basis should have been exactly one per cent of what the tax was on a $100 par basis. The fact is that the reduction in the par value created many holdings of stock totaling less than $100 par value, the transfer of which nevertheless was taxed at the minimum amount of two cents per share applicable to par value of $100 of face value "or fraction thereof."

The company duly filed a claim for refund, and after the rejection of the same by the Commissioner of Internal Revenue suit was filed in the Court of Claims. (R. 5) That court was of opinion that the tax was properly assessed and that the plaintiff should not recover. Judgment was therefore entered dismissing the petition, from which the plaintiff has appealed.

Assignment of Error.

1. The Court of Claims erred in holding that the stamp tax imposed by the Revenue Acts of 1918 and 1921 upon transfers of capital stock should be based upon the value appearing upon outstanding certificates of stock instead of upon the actual par value of the stock transferred as shown by the amended articles of incorporation.

2. The Court of Claims erred in dismissing the petition of the Goodyear Tire & Rubber Company.

Argument.

The Statute Involved.

The Revenue Act of 1918, which was in effect during the year 1921, and the Revenue Act of 1921, which was in effect during the calendar year 1922, contained certain identical provisions as follows, which were identical except as noted:

> "Sec. 1100. That on and after April 1, 1919,* there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this title, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, are written or printed, by any person who makes, signs, issues, sells, removes, consigns, or ships the same, or for whose use or benefit the same are made, signed, issued, sold, removed, consigned, or shipped, the several taxes specified in such schedule. The taxes imposed by this section shall, in the case of any article upon which a corresponding stamp tax is now imposed by law, be in lieu of such tax.
>
> "Schedule A. 4.** Capital stock, sales or transfers: On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to shares or certificates of stock or of profits or of interest in property or accumulations in any corporation, or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation, or by any assignment in blank, or

*"January 1, 1922," in the Revenue Act of 1921.
**"3" in the Revenue Act of 1921.

by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock, interest, or rights, or not, on each $100 of face value or fraction thereof, 2 cents, and where such shares are without par or face value, the tax shall be 2 cents on the transfer or sale or agreement to sell on each share (unless the actual value thereof is in excess of $100 per share, in which case the tax shall be 2 cents on each $100 of actual value or fraction thereof:)***." 40 Stat. L. 1133, 1135; 41 Stat. L. 301, 304.

"Face Value" in the statute means "Par Value."

It was conceded below and will probably be conceded in this Court that the words "face value" in the act mean the same thing as "par value."

The words are used interchangeably in the act itself, as will be noted from the expression "par or face value." Certainly the Bureau of Internal Revenue considered that "face value" and "par value" meant the same thing, as was shown by Article 10 of Regulations 40 (1922 edition), which dealt with this tax:

> "Art. 10. Rate of taxation.—(a) In the case of stock having a par or face value the amount of the tax is 2 cents on each $100 or fraction thereof of the total par or face value of the shares or certificates involved in the sale or agreement to sell, whether such aggregate par or face value is greater or less than $100; *e. g.*, where the total par or face of the shares involved in the transaction is $100 or less, the tax is 2 cents; where such value

***Words in brackets not in Revenue Act of 1921.

is in excess of $100, the tax is 2 cents on each $100 or fraction thereof.

"(b) In the case of shares of stock without par or face value, the tax is 2 cents on the transfer or sale of, or agreement to sell, each share." 24 Treasury Decisions, Internal Revenue 968.

In the letter claiming the tax, the Commissioner stated:

> "Transfer of 534,849 shares of old Com. $100 par value stock to voting trustees at 2 cents per share, tax due $10,696.98,"

indicating that the tax was on the par value and that no distinction was contemplated between face value and par value.

While we know of no cases expressly holding that there is no distinction between par value and face value of stock, probably because no one has ever contended seriously that there was such a distinction, there are cases containing language which indicates that the words are used interchangeably with the same meaning, for example:

> "Par value means face value. As given by Bouvier the words 'are commonly used to indicate the face value of bonds or stock,' and everybody knows that it is a current phrase expressive of this idea." Security Trust Co. v. Ford, 75 Oh. St. 322, 79 N. E. 474, 475.
>
> "When the shares are at face value they are at par, and when worth more they are above par, or at a premium (Cent. Dict., Vol. 4, p. 4271)." Boston & Maine R. R. v. United States, 265 Fed. 578, 579.

The Par Value of Corporate Stock is to be Found By Reference to the Certificate of Incorporation No Matter what may Appear on the Outstanding Stock Certificates.

The company's contention is as follows: The certificate of incorporation, with its amendments in effect at any particular time, determines the par value of the stock of a corporation at that time. Under the laws of the state the corporation is to be created with stock of a certain par value by filing a certificate of incorporation stating what the par value is. By the filing of such a certificate the par value is thereby created. By any amendments which are made pursuant to law the par value is changed. Certificates may be issued to the stockholders evidencing the amount of stock owned by them, and these certificates should state the par value of the outstanding stock, but the par value does not exist because the stock certificates state a par value but because the certificate of incorporation establishes a par value under the corporation laws of the particular state.

Therefore, in determining what is the par or face value of particular stock attention should be directed not to the outstanding stock certificates, which may be erroneous, but to the certificate of incorporation, which cannot be erroneous because it is in itself the contract between the corporation and the state.

No decision has been found on the precise question involved in the case at bar, but it is believed that these propositions are fundamental. The Court of Claims did not discuss them at all in its opinion, but apparently decided the case because of a mistaken belief that the transactions constituted a device to avoid the pay-

ment of a tax. That question is discussed later in this brief.

It was argued in the Court below that the contention of the company would impose upon the Bureau of Internal Revenue the burden of verifying the statements on the face of certificates by reference to minutes and other records. Of course, it is very seldom that anyone ever looks at a stock certificate. Anyone wishing to know the par value of corporate stock would look first in an investment manual, and if certain information were required would write to the Secretary of State of the state of incorporation for information derived directly from the certificate of incorporation.

But assuming that it may be some trouble to learn the true par value, nevertheless the tax must in the last analysis depend upon the actual facts. It is common knowledge that there have been literally thousands of tax disputes where the Bureau has audited the taxpayer's records and has claimed additional taxes by reason of not accepting the prima facie showing on which the taxes were paid. And as to income taxes at least it is well established that the true facts govern and not the mere book entries. Southern Pacific v. Lowe, 247 U. S. 330, 337, Baldwin Locomotive Works v. McCoach, 215 Fed. 967, 221 Fed. 59, Industrial Trust Co. v. Walsh, 222 Fed. 437, Forty Fort Coal Co. v. Kirkendall, 233 Fed. 704. There is no reason why a different rule should be adopted for stamp taxes and the true facts disregarded.

The Tax is on the Sale or Transfer of Capital Stock, not on the Delivery of the Certificates, and therefore Is Based on the Actual Par Value of the Capital Stock and not on such Amount as may be stated in the Certificates Delivered.

Except in the case at bar, the Bureau of Internal Revenue apparently has always held that the transfer tax accrues upon a sale or agreement to sell the capital stock involved, and that the tax does not accrue merely by the physical delivery of the certificate evidencing ownership of such capital stock.

Thus, if stock is actually transferred the liability to transfer tax immediately accrues irrespective of the transfer of the certificate or whether in fact there is any certificate.* Article 9 of Regulations 40 (1922 edition), *supra*, provided:

> "The stamp tax on sales or transfers of stock accrues * * * regardless of the time or manner of the delivery of the certificates or agreement or memorandum of sale."

And Article 12 provided in part:

> "(b) The sale or transfer of shares of stock, whether or not represented by certificates, is subject to tax.
>
> "(e) The sale or transfer of temporary or interim certificates of stock is subject to tax.
>
> "(g) The transfer of the interest of a subscriber for stock, however such interest may be evidenced or conditioned upon further payments, is subject to tax.

*NOTE.—The Bureau of Internal Revenue maintains a consistent attitude as to issue taxes, viz., that the tax is on the issue of stock and not on the certificate, so that if the stock is in fact issued the tax liability is incurred, whether or not any certificate is issued (Regs. 40, Art. 1).

"(h) The transfer of the right to subscribe for stock in any corporation, joint-stock company, or association, whether or not evidenced by warrants, is subject to tax."

On the other hand it is well recognized that the physical transfer of the certificates does not result in a tax in cases where the tax has already been paid because of an antecedent sale or in cases where there has actually been no transfer of ownership. Thus Article 13 of Regulations 40 (1922 edition), *supra*, provides, in part:

"Sales and transfers not subject to tax.—(a) The transfer of stock pursuant to a sale, where the memorandum of sale has been duly stamped, is not subject to tax.

"(c) The surrender of certificates in exchange for other certificates representing the same or new stock, provided they are issued to the same holders, is not subject to tax.

"(g) The transfer of certificates of stock from the decedent to the administrator or executor of the estate is not subject to tax."

These regulations are a clear recognition of the fact that the tax is on the actual transfer of ownership of the shares and does not arise because of anything which is done with the certificate itself. If follows that in determining the par value the Court should look to the actual par value of the shares the ownership of which has been transferred, as shown by the certificate of incorporation with its amendments, instead of going by a purported par value stated on the outstanding certificates which may or may not be delivered when the transfer tax is incurred.

Take, for example, the case of a memorandum of

sale: If an agreement is made to sell stock this agreement is subject to the transfer tax. Suppose the stock in question had a par value of $100 per share according to the certificate of incorporation, but the outstanding stock certificates had a par value of $50 per share, and suppose the parties to the agreement, in error or in order to avoid the tax, described the stock as having a par value of $1 per share. The tax is on the agreement to sell and according to the Government's present contention the tax would be based on a $1 par value because that is the amount stated in the agreement. But that would enable the parties to make their own tax by the wording of their agreement. It can hardly be doubted that the tax would in such a case be assessed upon the true par value which must be found by reference to the certificate of incorporation.

And what about the case of short sales? Suppose at the time the sales in the case at bar were made some other persons who had no certificates at all made short sales of the common stock of the Goodyear Tire & Rubber Company. They would have to pay a transfer tax, and how would the basis be found? Not from their certificates for they had none at the time. There can be but one method of determining the par value and that is by the certificate of incorporation.

There Is No Indication That the Reduction in Par Value Was to Avoid Taxes, but If It Was Such a Device That is Immaterial.

The decision of the Court of Claims seems to have been due in large part to a suspicion that the par

value in question was reduced before the transfers from $100.00 to $1.00 in order to reduce the amount of the transfer tax. See opinion, R. 8.

This does not seem probable. It is common knowledge that manufacturing companies had suffered tremendous losses during the period of deflation in 1920. The reduction in par from $100 to $1 can be readily explained as a step necessary in order to get rid of a deficit. If the $100 stock had been exchanged directly for non-par stock any existing deficit would have remained unless some other method had been found to get it off the books.

However, assuming that the suspicion of the Court of Claims was well founded and that the company did reduce the par value of the stock in order to reduce the taxes on its subsequent transfer, such a fact would have no bearing on the case. It was held in the case of United States v. Isham, 17 Wall. 496, that if a device to avoid the payment of taxes is carried out by means of legal forms it is subject to no legal censure. Thus the Supreme Court said in that case at page 506:

> "It is said that the transaction proved upon the trial in this case, is a device to avoid the payment of a stamp duty, and that its operation is that of a fraud upon the revenue. This may be true, and if not true in fact in this case, it may well be true in other instances. To this objection there are two answers.
>
> "1. That if the device is carried out by the means of legal forms, it is subject to no legal censure. To illustrate: The Stamp Act of 1862, imposed a duty of two cents upon a bank check, when drawn for an amount not less than $20.00. A careful individual, having the amount of $20.00

to pay, pays the same by handing to his creditor two checks of $10.00 each. He thus draws checks in payment of his debt to the amount of $20.00, and yet pays no stamp duty. This practice and this system he pursues habitually and persistently. While his operations deprive the Government of the duties it might reasonably expect to receive, it is not perceived that the practice is open to the charge of fraud. He resorts to devices to avoid the payment of duties, but they are not illegal. He has the legal right to split up his evidences of payment and thus to avoid the tax. The device we are considering is of the same nature."

Conclusion.

It is therefore respectfully submitted: Par value of corporate stock *exists* by reason of the fact that there is an existing certificate of incorporation stating the amount of the par value of such stock. There is no possible way to determine the actual par value of outstanding stock except by reference to the certificate of incorporation. The stock transfer tax involved was based on the sale of the stock itself and not upon the physical delivery of the certificates representing the shares. Since at the moment the transfer tax accrued the capital stock involved in this case had an actual par value of $1.00, that par value is controlling in determining the basis of the tax, and such par value as may have been stated on the outstanding certificates of stock is entirely immaterial.

It is therefore prayed that the judgment of the Court of Claims be reversed and that the case be remanded with an order to enter judgment for the

claimant in the sum of $10,231.92 with interest thereon at 6% per annum from May 26, 1923.

Respectfully submitted,

GEORGE RUBLEE,
SPENCER GORDON,
Attorneys for Appellant.